

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

FEB 13 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0334-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
RICHMOND OWEN CLARK,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-42124

Honorable John E. Davis, Judge

REVIEW GRANTED; RELIEF DENIED

Richmond Owen Clark

Coalinga, CA
In Propria Persona

H O W A R D, Presiding Judge.

¶1 In July 1994, petitioner Richmond Owen Clark was convicted after he pled guilty to charges of second-degree burglary and theft by control of stolen property having a value of \$1,500 or more. The trial court suspended imposition of sentence and placed him on three years' probation. In April 1995, the court revoked his probation and sentenced him to a mitigated term of 3.75 years in prison. On October 3, 2007, Clark filed a notice of post-

conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and maintained his failure to timely file a notice was the result of his low intelligence quotient, his inability to read and write at the time of sentencing, and his attorney's failure to file a notice on his behalf.¹

¶2 In his petition below, relying on *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), and Rules 17.1, 17.2, and 17.3, Ariz. R. Crim. P., Clark argued his constitutional rights were violated at his change-of-plea hearing because the trial court had failed to advise him of the consequences of a guilty plea, including the constitutional rights Clark would waive, before asking him, “How do you plead . . . ?” and ascertaining a factual basis for his guilty plea. He also maintained his attorney was ineffective in failing to object to this procedure.²

¶3 The trial court summarily denied Clark's petition, finding his guilty plea had been “knowingly, intelligently and voluntarily” entered. The court acknowledged that “the order of the questioning” by the judge at Clark's change-of-plea hearing had not been “the one usually employed.” But, the court reasoned, after first asking Clark for his plea and its factual basis, the judge had then advised Clark as required by Rule 17.2, had asked him repeatedly if he understood, and had even “answered perceptive questions from [Clark] about the effect of the conviction upon his chances for entering the United States Army.” The

¹The trial court did not resolve whether Clark's late filing was excusable pursuant to Rule 32.1(f), Ariz. R. Crim. P., but instead addressed the merits of Clark's claim.

²In addition, Clark argued that his plea agreement was not in writing, as required by Rule 17.4(b), Ariz. R. Crim. P. The trial court did not address this argument, and Clark has abandoned it on review. We note, however, that Clark did not plead guilty pursuant to an agreement but pled guilty to the indictment.

court further concluded Clark had failed to raise a colorable claim of ineffective assistance of counsel at the change-of-plea hearing.

¶4 In his petition for review of the trial court’s ruling, Clark again argues that his conviction should be overturned because a defendant must be admonished before pleading guilty and because the judge at his change-of-plea hearing never confirmed Clark’s desire to plead guilty after he had been fully apprised of the consequences of his guilty plea.

¶5 Absent an abuse of discretion, we will not disturb a trial court’s ruling on a petition for post-conviction relief. *State v. Sepulveda*, 201 Ariz. 158, ¶ 3, 32 P.3d 1085, 1086 (App. 2001). We find no abuse of discretion in the court’s finding that Clark’s plea was intelligent and voluntary. Although Clark stated in an affidavit that his “plea of guilty was asked for, made, and accepted” before he was advised of his constitutional rights, the court did not “accept[]” his plea until it had been satisfied, through a colloquy in open court, that Clark had been advised about and understood the consequences of pleading guilty, including the resulting waiver of his constitutional rights.³ See Ariz. R. Crim. P. 17.1(b) (“A plea of guilty . . . may be accepted only if voluntarily and intelligently made.”). Clark repeatedly told the judge at the change-of-plea hearing that he understood these admonitions, and the judge was entitled to rely on those assurances in finding Clark was intelligently entering his plea. See *State v. Djerf*, 191 Ariz. 583, ¶ 25, 959 P.2d 1274, 1283 (1998) (“defendant’s appropriate

³Clark argued below that the court was required—and failed—to inform him that, as a consequence of his plea, his conviction could be used to aggravate a sentence for an offense he might commit in the future. This is not the law in Arizona. See *State v. Watson*, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978).

and rational responses” relevant to conclusion that defendant fully understood consequences of waiver).

¶6 We also find no abuse of discretion in the trial court’s determination that Clark had failed to state a colorable claim of ineffective assistance of counsel. To establish prejudice for an ineffective assistance claim in the context of a plea agreement, a defendant must show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *State v. Bowers*, 192 Ariz. 419, ¶ 19, 966 P.2d 1023, 1028 (App. 1988), *quoting Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (to prevail on ineffective assistance claim, defendant must prove counsel’s performance was deficient and prejudiced the defense). Because Clark has never argued that he would not have pled guilty but for errors made by counsel or the court, he has failed to state a colorable claim of ineffective assistance of counsel. *See Bowers*, 192 Ariz. 419, ¶ 19, 966 P.2d at 1028

¶7 Although we grant the petition for review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge